

EXHIBIT B



**DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374**

**IN REPLY REFER TO:
5720
Ser 14/106
December 19, 2017**

Mr. James Coleman
Duke University School of Law
Science Drive and Towerview Road
P.O. Box 90360
Durham, NC 27708-0360

**SUBJECT: YOUR FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON
NAVY-2016-006502; FOIA APPEAL DON-NAVY-2018-001634**

This responds to your letter dated November 10, 2017, received by our office on November 20, 2017. You appeal the May 19, 2016, response by Naval Criminal Investigative Service (NCIS) to your May 11, 2016 request for "all records pertaining to security camera videos of Zenaida Taulbee and Randy Linneman leaving the Marine Corps Base, Camp Lejeune on January 5, 2004." NCIS administratively closed your request because the video files you sought had been transferred to the Onslow County Sheriff Department (OCSD). NCIS did not provide you with your administrative appellate rights under the FOIA.

Your current appeal also adds requests to interview various NCIS agents involved with the video files, a request for a "detailed account of NCIS's efforts to locate the missing footage", and a request for a log of all documents withheld under any FOIA exemption.

First, for the reasons explained below, your appeal is granted in part with respect to all records pertaining to the security camera videos that NCIS stated were transferred to OCSD. Second, your request to interview various NCIS agents is denied because witness testimony is not a government record under the FOIA. Finally, your request for a detailed account of NCIS's efforts to locate the alleged missing footage is a new request that will be forwarded to NCIS for review, with certain qualifications.

With respect to your original request, I find that the NCIS response was not adequate as they limited the scope of their search to only the video files in question and not all other records that might have pertained to those files. Please note, under the Navy's regulations pertaining to FOIA, a requester ordinarily has 90 days to appeal an adverse FOIA response. Your appeal is past this deadline, but because NCIS did not provide you appellate rights, I am remanding your case back to NCIS to address the totality of your request. Per your appeal, it looks as if you already have the NCIS Results of

5720

Ser 14/106

December 19, 2017

Investigation found in Attachments A, Q, K, M, and N. Accordingly, NCIS does not need to produce those documents as you already have them. We have, however, determined that NCIS may have other documents associated with the videos that are releasable under the FOIA. It is possible that NCIS may withhold or redact portions of the responsive documents under a FOIA exemption. You will retain the right to appeal any exemptions that NCIS claims to this office within 90 days of the NCIS response.

With respect to the actual video files, however, I find that NCIS adequately informed you that the files had been transferred to OCSD and that they no longer have records pertaining to your request. The adequacy of an agency's search for information requested under the FOIA is determined by a "reasonableness" test. *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986); *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983). As a general rule, an agency must undertake a search that is reasonably calculated to locate the requested information. *Kowalczyk v. Department of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996). The mere speculation that requested documents exist does not undermine the finding that the agency conducted a reasonable search. *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004) ("Likewise, the agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records.").

In this case, my staff spoke with NCIS, and was able to confirm that all video files were transferred to OCSD on April 14, 2016, and that all relevant databases had been searched for any video files. Accordingly, the search conducted by NCIS was adequate and no other search will likely produce other video files.

Next, with respect to your request to interview NCIS agents who have knowledge of the requested video files, I find that your request does not fall under the FOIA's definition of record found in 5 U.S.C. § 552(f)(2). As such, your request to obtain such information by interview is denied under the FOIA. My authority is limited to actions taken under the FOIA; I do not have authority under the FOIA to order NCIS personnel to be interviewed by you. However, you do have the right to request interviews of Department of Navy personnel under 32 C.F.R. Part 725, commonly called a Touhy request. NCIS has authority to consider your Touhy request. I suggest that you provide such a request to NCIS. Your request will need to comply with the C.F.R. regulation.

Finally, with respect to your request for a "detailed account of NCIS's efforts to locate the missing footage", I find that this is a new FOIA request that will be referred to NCIS for response to you. Please note, I am instructing NCIS only to check for records they have that would be responsive to your request, as the FOIA does not require them to create a new record that is responsive to your request. *See NLRB v. Sears, Roebuck &*

5720

Ser 14/106

December 19, 2017

Co., 421 U.S. 132, 162.

Additionally, I deny your request for a log or index of the responsive documents that have been released and withheld. I find that a "Vaughn Index" is not required during the administrative process; only during the judicial process as required by a court.

NCIS will have 20 business days from the date of this letter to respond to the remand. You will then have 90 days to appeal the NCIS response to this office.

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for the denial of this appeal. You may seek judicial review of this decision by filing a complaint in an appropriate U.S. District Court. My office represents the U.S. government and is therefore unable to assist you in this process.

If you would like to seek dispute resolution services, you have the right to contact the Department of the Navy's FOIA public liaison, Mr. Chris Julka, at christopher.a.julka@navy.mil or (703) 697-0031.

If you have further questions or concerns for my office, my point of contact is LCDR Adam Yost, JAGC, USN, who may be reached at adam.yost@navy.mil or (202) 685-5398.

Sincerely,



G. E. LATTIN

Director

General Litigation Division

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NCIS
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DON CIO